vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8736 OF 2003

Smt.Manoramabai Sitaram Vengurlekar ... Petitioner

V/s.

Kashinath Dnyanu Karande & Ors. ... Respondents

Mr.D.Deshmukh for Petitioner
Mr.C.N. Chavan for Respondent No.1
Mr.N.V. Mhatre for Respondent Nos.3 to 5

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **SEPTEMBER 1, 2005**

P.C.:

. The Petitioner has filed the petition against the order of the appellate Court discharging the notice rejecting the appeal memo. This has been done by the appellate Court since the appeal memo was not accompanied with an application for condoning the delay. The appellate Court has held that assuming such an application was not necessary, the delay could not be condoned.

2. The Petitioner has taken exception to these findings on the ground that no such application is necessary. It is also submitted on behalf of Petitioner that the delay in filing an appeal is not incurable.

Cogent and sufficient reasons to explain the delay have been furnished by the Petitioner, according to her advocate. Reliance is placed on the judgment of the Supreme Court in *State of M.P. & Anr. v/s. Pradeep Kumar & Anr.*, **(2000) 7 SCC 372** wherein the Apex Court has held that if an appeal has been presented beyond the period of limitation it is not an incurable defect and the appeal memo can be returned to the parties for proper presentation. Such a defect according to the Apex Court, can be cured by the party concerned and the appeal can be presented without further delay. As held by the Supreme Court, the word "shall" in Order 43 Rule 3-A(1) does not foreclose the chance to rectify a mistake. Therefore, in my view, the appellate Court has erred in dismissing the appeal.

3. Apart from this, there is in fact no delay in the matter. The trial Court has passed the judgment on 12.11.1998. The application for certified copy was filed on 13.11.1998 and the same was available on 2.2.1999. The decree was drawn up on 8.6.1999 and the appeal was filed on 1.7.1999. There is therefore no delay at all and the appellate Court had erred in rejecting the appeal.

4. In the circumstances, the Petition is allowed.

The appeal memo stands restored. The appeal shall be heard on merits.